92-625

NO. (1)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

MR. AND MRS. HENRY A. PLAISANCE, JR.
Petitioners

versus

TEXACO, INC. AND
CROSBY MARINE SERVICE, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Does a seaman have a "cause of action" for unseaworthiness and negligence under the General Maritime Law for emotional injuries suffered without physical impact?

2) Does the rule adopted by the United States Court of Appeals for the Fifth Circuit, i.e. "recovery is permitted in a negligence action for inflection of serious emotional distress where a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances," 937 F.2d 1010, require a factual determination by a trier of fact or may the Judge apply the rule as a matter of law?

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OPINIONS BELOW

The initial decision with written reasons by the United States District Court for the Eastern District of Louisiana is by "Minute Entry" dated January 26, 1990 and is unreported and appears at App. A, infra p.p. A-1 with the Judgment dated January 29, 1990. The ruling on plaintiffs' Motion for New Trial is by "Minute Entry" dated March 7, 1990 and is unreported and appears at App. B, infra p.p. A-8.

The first opinion of the United States Court of Appeals for the Fifth Circuit is reported at 937 F.2d 1004 and appears at App. C, infra p.p. A-11; rehearing en banc was ordered and is reported at 954 F.2d 266 and appears at App. D, infra, p.p. A-32; and, finally, the second opinion of the United States Court of Appeals for the Fifth Circuit is reported at 966 F.2d 166 and appears at App. E, infra p.p. A-34.

JURISDICTION

The judgment of the District court was entered on January 29, 1990, (App. A, infra p.p. A-1). The plaintiffs' Motion for New Trial was denied with written reasons on March 7, 1990 (App. B, infra p.p. A-8). The first opinion of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1991 reported at 937 F.2d 1004 and appears at App. C, infra p.p. A-11. The rehearing en banc was ordered by the Court's own motion on February 11, 1992 and is reported at 954 F.2d 266 and appears at App. D, infra p.p. A-32. The second opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 14, 1992, is reported at 966 F.2d 166 and appears at App. E, infra p.p. A-34. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

Henry Anthony Plaisance and Joyce Plaisance brought this action against Mr. Plaisance's employer, Crosby Marine Service, Inc., under the Jones Act and General Maritime Law for unseaworthiness of the tug to which he was assigned and against Texaco, Inc. under the General Maritime Law for unseaworthiness of its vessel, the spud barge in tow, and negligence, for damages for injuries sustained on or about January 29, 1989 while he was assigned to the M/V TOMMY CROSBY as a captain. Crosby Marine Service, Inc. has paid maintenance to date but has not paid all medical expenses to date.

Texaco, Inc. and Crosby Marine Service, Inc. filed a Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6) or for Partial Summary Judgment moving for dismissal of claims for emotional injury stating that plaintiffs did not state a cause of action under the Jones Act or under the General Maritime Law. Statements setting forth the facts in dispute were filed by all parties supported by affidavits and depositions taken up to that time. (Discovery had only started as the suit had been filed a few months before the motions were filed.) The District Court without oral argument granted the motion to dismiss as a matter of law.

The District Court granted the motion to dismiss for failure to state a cause of action as a matter of law because the facts were in dispute.

In the interim the Louisiana Supreme Court decided the case of *Lejeune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990) wherein the Louisiana Supreme Court reversed prior jurisprudence and permitted recovery for emotional injuries absent physical trauma. For this

reason and others, plaintiffs filed a motion for new trial alleging that this could have a bearing on the claim for unseaworthiness and negligence under the General Maritime Law because if there was no applicable federal maritime law the District Court could consider State law pursuant to *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). This motion was submitted without oral argument and denied with written reasons by the District Court.

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. After oral argument, the Fifth Circuit issued its opinion found at 937 F.2d 1004 wherein the Fifth Circuit, after considering the action of all the other circuits and the different approaches taken by various state courts, adopted the full recovery rule wherein "recovery is permitted in a negligence action for infliction of serious emotional distress where 'a reasonble person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances.' " 937 F.2d 1010.

The fifth Circuit concluded from disputed facts that Plaisance should have been "able to cope adequately with the mental distress occasioned by the circumstances."

Plaintiffs filed a Motion for Rehearing. Subsequently, the Fifth Circuit on its own motion ordered a rehearing en banc. After the rehearing en banc, the Fifth Circuit issued a second opinion (966 F.2d 166) wherein it reaffirmed its first opinion.

STATEMENT OF THE FACTS

Henry Plaisance was born and raised in Cut Off, Louisiana, is fifty-three years of age, has an eighth grade education, has been married once to Joyce Plaisance and they have five children. He has been working as a tug captain for thirty years and for his present employer, Crosby Marine Service, Inc., for ten years.

Texaco, Inc. owned a spudded workover barge on which it installed trailer-type buildings for living quarters and a tool house. Texaco hired a workover crew from Best Workover, Inc. to pull tubing from old wells around Caillou Island, Terrebonne Parish, State of Louisiana. The standby tug was the TOMMY CROSBY, operated by plaintiff. An additional tug, in this case the VIRGIE CENAC owned by Cenac Towing, was occasionally used to move the Texaco workover barge from well site to well site. Texaco kept representative, Henry Prejean, on the job to oversee and coordinate the work. All personnel received their instructions from Henry Prejean, the Texaco representative.

On January 29, 1989, Henry Prejean instructed the tugs TOMMY CROSBY and VIRGIE CENAC to relocate the workover barge from one wellhead to another. The distance between the wellheads was about one-half mile.

The flotilla was set up with the tug TOMMY CROSBY in the lead, then the workover barge, followed by the tug VIRGIE CENAC tied to the stern of the workover barge.

Henry Plaisance claims that he advised the Texaco representative, Henry Prejean, to take a different route but was ordered to take the most direct route to the new well

site.

As the flotilla proceeded, one of the spuds on the workover barge (it was later determined the spud could not be raised so its foot was flush with the bottom of the workover barge), hit a gas line on the water bottom which resulted in an explosion and a fire aboard the workover barge *and* the tug VIRGIE CENAC, with considerable damage to the tug.

After the fire started, Henry Plaisance backed the tug TOMMY CROSBY to the bow of the workover barge and the workover crew and the crew of the VIRGIE CENAC boarded the tug TOMMY CROSBY.

Other vessels came to the location of the fire to assist the flotilla.

Thereafter, the flotilla proceeded to Texaco's camp at Caillou Island. At that point the Texaco representative ordered Henry Plaisance to proceed to the Texaco fuel dock in the vicinity and to fill the fuel tanks on the TOMMY CROSBY. Henry Plaisance was then instructed to dock the TOMMY CROSBY next to the workover barge and to transfer diesel from the tanks of the TOMMY CROSBY to the fuel tanks of the workover barge.

During this process, diesel fuel was spilled on the deck of the TOMMY CROSBY by the mate and/or Texaco representative, and Henry Plaisance slipped on the deck striking his back and head.

Thereafter, Henry Plaisance and the TOMMY CROSBY were ordered to tow the workover barge to Cocodrie, Louisiana for repairs to the spud.

At Cocodrie, Henry Plaisance asked to be relieved and was taken to Our Lady of the Sea Hospital where he was treated for three days and was then transferred to Bayou Oaks, a psychiatric hospital in Houma, Louisiana. There he came under the care of Dr. D. F. Carlos, a psychiatrist, and was hospitalized for thirty days.

Dr. Carlos testified that Henry Plaisance is suffering from post-traumatic disorder and depression wherein Henry Plaisance perceived that he and the other men could have been burned or killed.

As of this time, Henry Plaisance is still under psychiatric care and his care is being paid for by his employer and he is receiving maintenance.

ARGUMENT

The District Court held as a matter of law that plaintiffs failed to state a cause of action. The judgment reads:

> "IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Defendants, Texaco, Inc. and Crosby Marine Service, Inc., dismissing Plaintiffs' claims in their entirety since Plaintiffs' Complaint does not allege a cause of action upon which relief can be granted."

The District Court had to so find to dismiss the case because the facts of the accident and degree of injury were disputed and each side submitted affidavits and depositions which put the facts of the case at issue.

The Fifth Circuit held plaintiff-appellant, Plaisance,

had a cause of action under the Jones Act for a purely emotional injury absent physical trauma and then, pursuant to their "New Rubric" or "rule" held that "the injury complained of was not a reasonably foreseeable consequence of the alleged negligence" (937 F.2d 1004) and affirmed the District Court's dismissal.

In this case the Fifth Circuit could not apply its "rule" to the "disputed" facts in the record so the Fifth Circuit decided the facts:

> "Applying the rubric we adopt today to the facts of the case at bar, we find that the district court appropriately dismissed the complaint. The injury complained of is not a reasonably foreseeable consequence of the alleged negligence. One would not reasonably expect a normally constituted seaman, much less a senior, very experienced tugboat captain, to have the emotional reaction alleged by Plaisance who, objectively assessed, was not threatened by the fire. Further, fires in the oilfield and the flaring of gas were not unusual sights and the other crews were not placed in significant danger. Indeed, the crews of the barge and accompanying tugboat quickly moved to the safety of Plaisance's vessel, which Plaisance placed directly against the barge without being so ordered and without comment. It was a smooth, nigh routine maneuver lasting only a few minutes. It was not until many hours later, and only after he allegedly slipped and fell on spilled fuel on his deck that Plaisance asked to be relieved. Our conclusion is buttressed by the observation of the treating psychiatrist who testified that he was baffled by Plaisance's overall reaction. We share that bafflement."

As to the general maritime claims for unsea-

worthiness against the employer, Crosby Marine Service, Inc. and Texaco, Inc. and the general maritime claim for negligence against Texaco, Inc. the Fifth Circuit held at page 1006, footnote 1:

> "In light of our ultimate disposition of the Plaisance claims, we need not resolve the parallel question whether the general maritime law would permit recovery for purely emotional injury."

These actions by the Fifth Circuit raise the following questions. The Jones Act is a negligence statute and the General Maritime Law is suppose to be a living, breathing, body of law. It is hornbook law that a plaintiff may prevail under one or both theories, and that the law under each claim is *different* with *different standards.* Does the same "New Rubric" or "rule" established by the Fifth Circuit apply to the unseaworthiness claim under the General Maritime Law against Crosby Marine Services, Inc. and Texaco, Inc. and/or the negligence claim under the General Maritime Law against Texaco, Inc.? It would seem from the opinions that the "rule" under the Jones Act has to be the same for the claims made under the General Maritime Law and, if not, then what is the "rule" for a claim under the maritime law for unseaworthiness and negligence and can Plaisance prevail?

It would seem that the "rule" calls for a conclusion of fact not law. If Plaisance does have a "cause of action," then who decides if the injury complained of is not a reasonably foreseeable consequence of the alleged negligence - a Judge as a matter of law or the finder of fact?

Plaisance was ordered to tow a barge in a shallow bay with hundreds of gas lines buried years ago. These lines belong to Texaco, Inc. The barge being towed was

owned by Texaco, Inc. Isn't it foreseeable, if the barge's spuds are not positioned properly, the spuds could hit a gas line and cause an explosion? Any reasonable person would have to say "yes."

Then, if there is an explosion, might some of the seamen be affected differently than others, and could some suffer a purely emotional injury due to the circumstances of the accident, which could lead a seaman to believe he was in danger of burning or being killed? Any reasonable person would have to say "yes."

The Fifth Circuit "buttressed" its opinions with the "observation of the treating psychiatrist," whose name is not given, who allegedly testified he was "baffled" by Plaisance's overall reaction. Is this a finding of fact?

Plaisance has been sent to other psychiatrists, who were not chosen by either side to this litigation, who found Plaisance is totally disabled. In fact, Social Security has found Plaisance totally disabled as a result of this injury.

Hasn't the Fifth Circuit in essence granted "summary judgment" or prejudged the case without hearing all the evidence? This motion was filed early in the litigation and Plaisance was never given the opportunity to present a witness list, expert or formal testimony. Is this "rule" to be applied by District Courts as a matter of law or is the test a mixed question of fact and law, and shouldn't the finder of fact decide the case?

If Plaisance has stated a cause of action under the Jones Act, should this case have been remanded to give Plaisance an opportunity to prove his case?

This case sets a new precedent for Jones Act cases.

The Judge as a matter of law has the right to apply the "New Rubric" or "rule" to the facts and decide "if the injury complained of is a reasonably foreseeable consequence of the alleged negligence." One would have to assume that based upon the background of a District Judge a particular plaintiff may or may not prevail. Until now questions of reasonable consequence or causation was left to the trier of the facts and not the Judge, unless, of course, the case was tried to a Judge without a Jury.

Decisions of Circuit Courts should help litigants by providing succinct answers to the issues and not leave the litigants with more unresolved issues than when they started. This decision does not provide any answers but more questions.

We would respectfully ask the Supreme Court to decide:

1) Whether or not a seaman may recover for a purely emotional tort based on an unseaworthiness claim under the General Maritime Law.

2) Whether or not a seaman may recover for a purely emotional tort based on negligence under the General Maritime Law.

3) If a seaman has a cause of action for a purely emotional injury under the Jones Act, is the "New Rubric" or "rule" a question to be decided by the finder of fact or by the court as a matter of law?

CONCLUSION

In *Buell, supra*, the Supreme Court indicates that the lower federal courts should look to common law or state law. The law of Louisiana does allow recovery for emotional injury absent physical trauma. Had this suit been filed in the State Courts of Louisiana plaintiff would have had a cause of action under maritime law and could have had the case tried by a jury.

The federal courts are the mother of maritime law in this country and this Court should set the standard for the lower federal and state courts to follow.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Behalf of Petitioners, Mr. and Mrs. Henry Plaisance, Jr., has been furnished all counsel of record on this 7th day of October, 1992.

_____

JOSEPH J. WEIGAND, JR.

APPENDIX A

MINUTE ENTRY
McNAMARA, J.
JANUARY 26, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
JAN 30 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

Before the court is the Motion of Defendants, Texaco, Inc. and Crosby Marine Service, Inc., to Dismiss Certain Claims pursuant to Fed. R. Civ. P. 12(b)(6), or for Partial Summary Judgment. Plaintiffs, Mr. and Mrs. Henry Anthony Plaisance, Jr., oppose this Motion. The Motion, set to be heard on Wednesday, January 24, 1990, is before the court on briefs, without oral argument.

Defendants move this court to dismiss Plaintiffs' claims that are attributable to emotional injury, arguing that Plaintiffs have not stated a cause of action under

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either the Jones Act or under general maritime law. The seminal case on this issue is *Gaston v. Flowers Transp.*, 866 F. 2d 816 (5th Cir. 1989), which considered a seaman's action to recover for mental anguish resulting from watching his half-brother being crushed to death between two vessels. The court held that the seaman who did not show that he reasonably believed he was in actual physical danger when the accident occurred, could not recover under the Jones Act for mental anguish. The court examined the legislative history of the Jones Act, and concluded that "even a liberal interpretation of the Jones Act [does not require] extending recovery to those who suffer purely emotional injury." *Id.* at 817.

The Fifth Circuit decision of *Hagerty v. L. & L Marine Services, Inc.*, 788 F. 2d 315 (5th Cir. 1986), however, allowed a plaintiff to recover for emotional injuries "from fear of developing cancer where his fear [was] reasonable and causally related to the defendant's negligence." *Id.* at 318. The plaintiff in *Hagerty* was drenched in cancer-causing chemicals. The actual physical impact in *Hagerty* differentiated that plaintiff's claim from the claim before the *Gaston* court. The *Gaston* plaintiff never feared for his own safety, and did not experience a physical tort that was causally related to his claim of emotional injury.

The *Gaston* court was concerned about extending liability to situations of a bystander's emotional reactions for two reasons. First, the court noted that allowing this type of recovery "would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages." 866 F. 2d at 819. Second, the court found "something incongruous" in allowing this type of recovery for seamen since "[t]hese [persons] have knowingly and voluntarily chosen callings which, while today perhaps not fairly termed dangerous, yet do in-

volve braving certain hazards and are traditionally not well suited to the squeamish or fainthearted." *Id.* at 820. The court concluded, therefore, that allowing such a recovery is a decision that would be more appropriately left for the legislature. *Id.*

The court also considered whether Mr. Gaston could recover for finding himself in a "zone of danger." *Id.* The court noted that while Louisiana law allows for such a recovery, Gaston made no showing that he ever thought himself to be in danger. As such, the court did not decide the issue. In concluding, the court limited its holding as follows:

> We do not hold today that no recovery can be had under the FELA/Jones Act for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him. That fact situation is not presented today. But whatever merit allowing recovery for purely emotional injury may have or may lack, we see none in allowing mere crewmen-bystanders to recover for witnessing the misfortune of another. *Id.* at 821.

In the instant litigation, Mr. Plaisance's claim is distinguishable from both *Hagerty* and *Gaston.* Unlike the *Hagerty* plaintiff, Plaisance did not experience any actual physical impact. Mr. Plaisance's claim is distinguishable from the *Gaston* claim, however, because Plaisance perceived himself to be in actual danger. Plaintiff witnessed a fire while working as the captain of the tug TOMMY CROSBY. The fire was extinguished, the TOMMY CROSBY was not damaged, and no one was injured as a result of the fire. Plaintiff did not participate in fighting the fire, and persons on other vessels in the vicinity of the fire escaped the fire by going to the vessel upon which Plaisance was working. Objectively, therefore, plaintiff did not seem to be in a

"zone of danger" during the fire.

While the record contains no evidence that Plaintiff was actually in danger during the fire, he nevertheless perceived himself to be in danger. In his deposition, Plaintiff reported that he asked to be relieved from his duties because he was upset about the accident. Plaintiff stated that he was disturbed "[t]hat we could have all burned and all. That's what I told him, you know, that I could have all—blew them up and all, you know...Well, that we could have all burned, you know, with the fire." Deposition, p. 106. Plaintiff alleges that he still dreams about the accident. He reported, "I see that [in his dreams]—the fire, you know. Those men running, you know. Running on my boat and all." Deposition, p. 110.

The facts of this case reveal that Mr. Plaisance's situation is more closely analogous to the *Gaston* decision rather than the situation in *Hagerty*. Plaintiff suffered no physical impact which led to his alleged emotional injury. Instead, Plaintiff claims injury only as a result of watching the fire. Nobody was injured in the blaze, Plaintiff's vessel was not damaged, and Plaisance did not undergo the trauma of watching someone else being seriously injured. Moreover, Plaintiff was not, objectively, in a zone of danger. Plaintiff, However, perceived himself to be in actual physical danger during the fire. While the reasonableness of Plaintiff's fear is ultimately a fact question, this court's reading of *Gaston* indicated that a plaintiff's subjective belief that he was in danger, standing alone, is probably insufficient to give rise to a cause of action for emotional injury under the Jones Act. In addition, Plaintiff cites no authority which indicates that a seaman can recover for a purely emotional injury under the general maritime law. Since the court is unaware of any authority in this regard, the court finds that Plaintiffs do not state

a viable cause of action under the general maritime law.

Since the court concludes that Plaintiffs have not stated a viable cause of action for emotional injury in this matter, the court finds that this lawsuit should be dismissed in its entirety. Defendants' Motion only seeks to dismiss Plaintiffs' claim for damages as a result of witnessing the fire, stating that Defendants will challenge Plaisance's right to receive maintenance and cure, as well as Plaintiffs' claim for damages resulting from an alleged slip and fall that occurred approximately two hours after the fire incident. The court notes that Plaintiffs' complaint does not make a claim for maintenance and cure. It is well-settled that a seaman has the right, under the general maritime law, to recover maintenancce and cure irrespective of the negligence or fault of his employer unless the injury was brought about by his own willful misbehavior. Martin J. Norris, The Law of Seaman §678 (3d. ed. Supp. 1984). Here, however, there is no claim for maintenance and cure before the court.

Regarding Mr. Plaisance's alleged slip and fall, this incident is also not pled in Plaintiffs' complaint, and it is not causally related to the fire. After the fire had been extinguished, the flotilla proceeded to Texaco's camp at Caillou Island. At that point the TOMMY CROSBY stopped at the Texaco fuel dock in order to fill its fuel tanks. Mr. Plaisance docked the tug next to the workover barge to transfer fuel from the tanks of the TOMMY CROSBY to the workover barge. During the process, diesel fuel was spilled on the deck of the tug, and Mr. Plaisance allegedly slipped and fell, landing on his back and head. This accident occurred at least two to three hours after the fire incident. Plaisance did not record his alleged slip and fall on the boat log, nor on the handwritten accident report which he signed after the accident. Moreover, he did not report

this incident to anyone from Crosby or Texaco.

The court finds no connection between the fire and the slip and fall. Plaisance's deposition does not allege any connection between the incidents, and Plaintiffs' memorandum in opposition to Defendants' Motion does not indicate that the two accidents are connected in any way. The court's own analysis of the record does not reveal any causal link between the accidents. The slip and fall is not related in terms of time, location, or circumstances to the fire. Accordingly, since the slip and fall has not been pled separately, the court holds that this issue is not properly before the court at this time.

Accordingly, IT IS ORDERED that Defendants', Texaco, Inc. and Crosby Marine Services, Inc., Motion to Dismiss Certain Claims Pursuant to Fed. R. Civ. P. 12 (b) (6), or for Partial Summary Judgment, should be and is GRANTED dismissing Plaintiffs' complaint in its entirety since the court finds that Plaisance's other potential causes of action have not been pled and are therefore not properly before the court. Judgment will be entered accordingly.

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
JAN 30 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

J U D G M E N T

In accordance with this court's Minute Entry dated January 26, 1990;

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Defendants, Texaco, Inc. and Crosby Marine Services, Inc., dismissing Plaintiffs' claims in their entirety since Plaintiffs' Complaint does not allege a cause of action upon which relief can be granted.

New Orleans, Louisiana, this 29th day of January, 1990.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY JAN 31 1990

APPENDIX B

MINUTE ENTRY
McNAMARA, J.
MARCH 7, 1990

MAR 12 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
MAR 8 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

Before the court is the Motion of Plaintiffs, Mr. and Mrs. Henry Anthony Plaisance, Jr., for a New Trial. Defendants, Texaco, Inc. and Crosby Marine Services, Inc., oppose this Motion. The Motion, set to be heard on Wednesday, March 7, 1990, is before the court on briefs, without oral argument.

Plaintiffs argue that the court's decision to dismiss this matter was in error for several reasons. First, Plaintiffs contend, based upon *Gaston v. Flowers Transportation*, 866 F. 2d 816, 820 (5th Cir. 1989), that the determina-

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tion of whether Plaisance was in a zone of danger is a fact question. The *Gaston* decision does not definitely state whether it is a judge or jury question, but this court holds that it is ultimately a question of law.

Plaintiffs also argue that the new Louisiana Supreme Court case, *Lejeune v. Rayne Branch Hospital*, No. 89-CC-0575, February 5, 1990, changes the law that is applicable to this case. Plaintiffs' contention fails for two reasons. First, jurisdiction in this matter is based upon the Jones Act and the General Maritime Law; thus, Louisiana law is not controlling, even though a district court can look toward state law for guidance. *Gaston*, 866 F.2d at 820. Second, *Lejeune* is clearly distinguishable from Plaisance's situation. The *Lejeune* decision allows a plaintiff-bystander to recover damages for emotional injury when a plaintiff witnesses an injury to some victim or witnesses damage occurring as a result of an accident to some victim, so long as the plaintiff-bystander had a close relationship with the victim injured by the physical trauma. In contrast, Plaisance claims damages for emotional injury solely from watching a fire. Nobody was injured, and there is no evidence to indicate that either Plaisance or someone related to him was in actual danger from the fire.

Finally, Plaintiffs argue that the unseaworthiness remedy allows recovery for a bystander's emotional injury. Plaintiffs insist that the *Gaston* decision, which expressly disallows such a remedy, is in error since the case *Sosa v. M/V Lago Izabel*, 736 F.2d 1028 (5th Cir. 1984), allows a plaintiff to recover for mental anguish accompanying a physical trauma. Plaintiffs' contention is in error since the *Sosa* decision only allowed recovery for mental anguish as part of a pain and suffering award that accompanied a physical injury.

Accordingly, IT IS ORDERED that Plaintiffs', Mr. and Mrs. Henry Anthony Plaisance, Jr., Motion for a New Trial, should be and is DENIED.

* * * *

APPENDIX C

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1991.

Tugboat captain and spouse brought action seeking to recover for alleged emotional injury that resulted from witnessing fire. The United States District Court for the Eastern District of Louisiana, 735 F.Supp. 686, A.J. McNamara, J., dismissed claims. Captain and spouse appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) claim for negligently inflicted emotional injury is cognizable under Federal Employers' Liability Act (FELA) and Jones Act, even without accompanying physical injury or contact, and (2) captain's emotional injury was not reasonably foreseeable consequence of alleged negligent rupturing of underwater gas line and causing fire and, therefore, was not recoverable.

Affirmed.

Edith H. Jones, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

Today we determine whether there can be recovery under the Jones Act for a purely emotional injury. Concluding for the reasons assigned that such recovery is permissible, but that the claims of appellants herein factually do not qualify, we reach the same result as did the district court, and affirm its dismissal.

Background

Henry A. Plaisance, Jr. had over 30 years experience as a tugboat captain, the last 10 of which had been in the employ of Crosby Marine Service, Inc., when, on January 29, 1989, he allegedly sustained a significant emotional injury as a result of an allision with an underwater gas line. On that date Plaisance was operating the tug TOMMY CROSBY, towing a workover barge from one well location to another in Louisiana coastal waters. The TOMMY CROSBY was under contract to Texaco, Inc. A second tug, the VERGIE CENAC, was tied to the rear of the barge. Apparently one of the barge's spuds projected below its bottom and came in contact with an underwater-4-inch gas pipeline. The pipeline ruptured, the gas escaped, and an explosion and fire ensued.

The TOMMY CROSBY had a relatively short tow line. Plaisance immediately backed up to the barge and the workers on the barge and the crew of the VERGIE CENAC quickly moved to the safety of the TOMMY CROSBY. The

tow was disconnected and the TOMMY CROSBY was taken a short distance off. It was immediately apparent that the fire was confined to the rear of the barge and the front of the trailing tug; the tether lines between the two burned and separated and the VERGIE CENAC began to drift. Upon instructions from the Texaco supervisor aboard, Plaisance reconnected the tow lines, pulled the barge away from the rupture site and spudded it in place. The fire was then extinguished by the combined crews aided by the crews of other vessels which were attracted by the fire. The entire operation took less than 30 minutes.

No one was injured by the explosion or fire. The flotilla (the two tugs and the barge) then proceeded to the nearby Texaco camp, the barge was spudded and the TOMMY CROSBY went to a Texaco fuel dock in the vicinity to get a load of diesel for transfer to the barge. The fuel was transferred and the barge was then towed in for repairs. Several hours later, upon arriving at the repair dock, Plaisance asked to be relieved of duty because he did not feel well.

Plaisance first went to a local hospital for a few days and then transferred to a psychiatric hospital where he remained for 45 days. According to the treating psychiatrist, Plaisance was suffering from post-traumatic stress disorder and depression resulting from his perception that he and the others could have been injured or killed in the explosion and fire. As of the time of the disposition in the trial court, Plaisance continued to receive periodic psychiatric care and continued to express an inability to return to work.

Plaisance and his wife filed the instant personal injury action, invoking the Jones Act, 46 U.S.C.App. § 688, and general maritime law against Crosby, and general

maritime law against Texaco, claiming total disability from an emotional injury. Defendants moved to dismiss the claims as not being cognizable under either the Jones Act or general maritime law. The district court agreed and dismissed the Plaisance claims, 735 F.Supp. 686. They timely appealed.

Analysis

[1] The Plaisances seek recovery under the Jones Act[1] for a purely emotional injury. The Jones Act, and its underlying statutory structure, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, are silent as to whether injuries, within their meaning, include an injury which is entirely mental. Appellees contend that our recent decision in *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), forcloses this inquiry. It does not. *Gaston* was a bystander case and we very carefully noted its limitations, stating:

> We do not hold today that no recovery can be had under the FELA/Jones Act for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him.

Id. at 821. In the case at bar Plaisance alleges an occurrence that happened to him. We therefore here address an issue of first impression for our court.

The Supreme Court recently considered the issue of recovery for purely emotional injuries under the FELA in *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), but declined to decide

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[1] In light of our ultimate disposition of the Plaisance claims, we need not resolve the parallel question whether the general maritime law would permit recovery for a purely emotional injury.

whether the FELA permitted such claims. The Court, did, however, opine that

> [t]he question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA juris-prudence gleans guidance from common law developments, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity.... In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Id. at 568, 570, 107 S.Ct. at 1417, 1418 (citations omitted). The Supreme Court thus left open the question whether one may recover for purely emotional injuries under the FELA, suggesting that the federal courts consult the common law for guidance. *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417; *Gaston*, 866 F.2d at 820. We do so, mindful that "[w]hat constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes." *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949); *see also Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

The comments by the Supreme Court in *Buell* generally have been viewed as an open invitation to the

lower federal courts to explore the possibility of recovery under the FELA for a purely emotional injury. *Moody v. Maine C.R. Co.*, 823 F.2d 693 (1st Cir.1987). Other than the Ninth Circuit in the underlying *Buell* decision, 771 F.2d 1320 (9th Cir.1985), and its progeny, *e.g., Taylor v. Burlington Northern Railway Co.*, 787 F.2d 1309 (9th Cir.1986), no circuit has as yet so ruled. We previously have brushed against the edges but have not dispositively addressed this issue.

We first considered the matter in *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir.1986), wherein the plaintiff sought recovery for his fear of developing cancer as a result of being soaked with toxic chemicals. The district court granted defendant a summary judgment stating that Hagerty had no cause of action because he had not sustained a physical injury. We reversed, seizing on the fact that Hagerty had been doused with the toxic chemicals and, as a result, temporarily had experienced dizziness, leg cramps, and a stinging sensation in his extremities. We found a cause of action. In remanding, we stated that Hagerty's "present fear or anxiety due to the possibility of contracting cancer constitutes a present fact of mental anguish and may be included in recoverable damages." *Id.* at 317. Although we declined to decide whether emotional injuries alone could serve as basis for recovery, in dicta we indicated support for the proposition. We first noted that the Jones Act was "intended to provide coverage for all work-related 'injuries,' whether characterized as mental or physical." *Id.* at 318. We then criticized the negligence rules limiting recovery for emotional distress to claims accompanied by a physical injury or physical impact, stating that these rules were unrealistic and provided dubious mechanisms for objectively assuring that an alleged mental injury was not feigned. "With or without physical injury or impact, a plaintiff is entitled to

recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable...." *Id.* at 318.

We next considered the matter in *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989), where the plaintiff based his FELA claim on a nervous breakdown which allegedly resulted from either deliberate harassment or negligent treatment by the employer. The trial court indicated a willingness to permit recovery under the FELA for purely emotional injuries but granted summary judgment to the defendant because Netto had failed to make the required showing of unconscionable abuse or outrageous conduct.[2] On appeal we affirmed on the ground advanced by the trial court. In doing so we declined to decide if an FELA plaintiff may recover for purely emotional injuries.

In our most recent foray, *Gaston v. Flowers Transportation*, the plaintiff sought Jones Act and general admiralty law recovery for the emotional injury he suffered as a result of seeing his half-brother crushed to death between two vessels. We rejected the argument that *Hagerty* provided the basis for recovery for a purely emotional injury. Rather, we noted that while *Hagerty* "did observe that a Jones Act recovery was possible without physical impact, that statement was necessarily dictum; for Mr. Hagerty did suffer impact, having been drenched with cancer-causing chemicals." 866 F.2d at 819. *Gaston* interpreted *Hagerty* as leaving open the question whether a purely emotional injury is recoverable under the Jones Act. Further, and of greater importance, we observed that "Hagerty's recovery was one ... based on an event directly

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[2] The trial court only addressed Netto's claim for intentional infliction of emotional distress and not his claim for negligent infliction of emotional distress. Netto did not present this latter claim on appeal; we did not address it. *Netto*, 863 F.2d at 1214 n. 4.

affecting *him*. In today's case, Mr. Gaston seeks recovery for a bystander injury that resulted from witnessing the death of *another*." *Id.* at 819. We indicated that even if we were to permit recovery for purely emotional injuries, we would not do so in the bystander context.[3] Finally, we rejected Gaston's zone of danger claim because Gaston did not make a showing that he thought himself to be in danger. We expressly noted, however, as quoted above, that we were not barring recovery under the Jones Act "for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him." *Id.* at 821.

Although presented with these opportunities, we previously have not resolved the question whether the FELA permits recovery for purely emotional injuries. Our colleagues in the First, Third, Fourth, Sixth and Seventh Circuits similarly have declined the *Buell* invitation.

In *Moody v. Maine Cent. R. Co.*, 823 F.2d 693 (1st Cir.1987), the plaintiff's FELA complaint alleged that his employer's negligent harassment caused emotional distress with attendant physical symptoms. The First Circuit upheld the trial court's grant of summary judgment to the defendant concluding that Moody had failed to present sufficient evidence of causation. The court opted against exploring the possibility of recovery under the FELA for emotional injuries unaccompanied by physical injury which *Buell* signaled.

The plaintiff's FELA claim in *Holliday v. Conrail*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111

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[3] Bystander liability is the recovery of damages for witnessing the death or injury to another without significant injury or fear to the witness. *Gaston*, 866 F.2d at 817 n. 1.

S.Ct. 970, 112 L.Ed.2d 1057 (1991), alleged that his employer negligently assigned him to a position for which he was unqualified, that he made several errors and was almost killed, and that as a result he suffered emotional injuries with physical manifestations. Rather than apply a negligence standard to the facts of the case the Third Circuit assessed Holliday's claim in an *ad hoc* manner, focusing on the "nature of his injury and the character of the tortious activity." *Id.* at 423 (brackets omitted) (quoting *Buell*, 107 S.Ct. at 1417). The court upheld the grant of summary judgment in favor of the defendant finding that the "allegedly tortious activity ... was simply an ordinary management decision and was not of such a character that [the employee's] emotional reaction and related physical consequences constituted an 'injury' compensable under the FELA." *Id.* at 425. By emphasizing the narrowness of its opinion and its fact-specific basis, the majority opinion took care to reflect that it was not deciding whether recovery for purely emotional injuries is permitted under the FELA.[4]

Similarly, the plaintiff in *Elliott v. Norfolk & Western Ry. Co.*, 910 F.2d 1224 (4th Cir.1990), based her FELA claim on allegations that her employer's mistreatment had resulted in emotional distress. In upholding summary judgment for the defendant the Fourth Circuit found that the plaintiff had failed to make a sufficient showing of unconscionable abuse or outrageous conduct, deemed an essential element of her claim. The court expressly declined to decide "whether one may recover under the FELA for purely emotional injuries without additional physical symptoms...." *Id.* at 1229.

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[4] Judge Mansmann dissented because he was convinced that "as a matter of law that the FELA permits a recovery for emotional distress" *Id.* at 427.

Meanwhile, in *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct. 452, 98 L.Ed.2d 392 (1987), the plaintiff's FELA action alleged the intentional infliction of emotional distress resulting from a threatened discharge for insubordination. The Sixth Circuit distinguished *Buell* on the ground that it referred only to negligent conduct giving rise to an FELA claim and held "that this claim of an intentional tort resulting in a purely emotional injury is not cognizable under the FELA." *Id.* at 342. Whether the Sixth Circuit would likewise bar an FELA claim for the negligent infliction of emotional distress was left open in *Adams v. CSX Transp., Inc.*, 899 F.2d 536 (6th Cir.1990). Adams claimed the negligent infliction of emotional distress by his employer's failure to provide an emotionally safe workplace, leading to a severe depression which required hospitalization. The Sixth Circuit upheld the magistrate judge's ruling in favor of the defendant on the ground that Adams failed to establish either the breach of the employer's duty to provide an emotionally safe workplace or the foreseeability of the emotional injury. The court expressly stated that it was not deciding whether there might be recovery for a purely emotional injury under the FELA.[5] *See also Stoklosa v. Conrail*, 864 F.2d 425, 426 (6th Cir.1988) ("We leave for another day the question of whether negligent infliction of emotional distress resulting in emotional injury with no verifiable physical manifestation is actionable under FELA.").

Finally, the circuit roundup includes the decisions by the Seventh Circuit. In *Hammond v. Terminal R. Ass'n.*, 848 F.2d 95 (7th Cir.1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1170, 103 L.Ed.2d 229 (1989), that court reiterated its

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[5] Citing *Buell* and *Netto*, the Sixth Circuit held that the duty to provide an emotionally safe workplace is breached by unconscionable abuse. 899 F.2d at 539-40.

pre-*Buell* position that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." *Id.* at 96. This position was reaffirmed in *Gillman v. Burlington N.R.R. Co.*, 878 F.2d 1020 (7th Cir.1989). Gillam invoked the FELA, alleging an emotional injury resulting from an accident in which a co-worker was killed. The trial court indicated that this cause of action was permitted under the FELA but dismissed the complaint because it failed to state a claim for negligent infliction of emotional distress under Illinois law. The Seventh Circuit affirmed on that basis and opted not to decide whether an action for negligent infliction of emotional distress, unaccompanied by physical contact or the threat of physical contact, is cognizable under the FELA.

Excepting our colleagues in the Ninth Circuit, our circuit brethren have indicated a reluctance to field the *Buell* pitch. We end that reluctance today, persuaded that an emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury. We therefore hold that a claim for an emotional injury caused by emotional distress negligently inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA. Now we must articulate a rubric to govern the recovery for such claims, no mean task.

The New Rubric

[2] The Supreme Court suggested an examination of the common law in our quest for guidance. We find no universal rule with which to assess the negligent infliction of emotional injury. The states essentially employ four basic paradigms: (1) physical injury or impact; (2) zone of danger; (3) bystander; and (4) full recovery. Comment, *A*

New Tort California: Negligent Infliction of Emotional Distress (For Married Couples Only), 41 Hastings L.J. 447 (1990) (hereinafter *A New Tort*).

The physical injury or impact rule permits recovery for emotional injury provided there is some physical contact. The ostensible justification for this requirement is that it affords a semblance of a guarantee that the mental injury is genuine. *Restatement (Second) of Torts* § 436 A comment b (1965); W. Keeton, *Prosser and Keeton on Torts* 363 (5th ed. 1984). It provides a bright line basis for recovery for an emotional injury. This rule has been criticized however, as being arbitrarily underinclusive for there are genuine mental injuries that are not accompanied by a physical injury or impact.[6] *Buell*, 480 U.S. at 569 n. 18, 107 S.Ct. at 1417 n. 18 ("The American Law Institute urges that as long as the distress is 'genuine and severe,' bodily harm should not be required."); Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U.Fla.L.Rev. 333, 337 (1984) (hereinafter *The Bell Tolls*).

The zone of danger doctrine provides for the recovery for emotional injuries resulting from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence. While this rubric permits recovery in some instances excluded by the physical injury or impact rule, it nevertheless suffers from the same basic failing: it excludes recovery by persons suffering a genuine emotional injury. The arbitrary nature of this rule is best illustrated by the circumstance that the difference of a handful of inches may

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[6] In reaction to the harsh and seemingly arbitrary exclusion of such genuine claims, some courts have gone to extraordinary lengths to find an "injury" or "impact" to compensate deserving plaintiffs. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U.Fla.L., Rev. 333, 337 (1984).

determine compensation for emotional distress. *A New Tort, supra.* Further the rule conditions recovery upon a person's fear for one's own safety whereas the true cause for the emotional distress might be seeing another injured or killed.

The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim. *Dillon v. Legg,* 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (1968). While this rule provides a broader scope of recovery than the zone of danger test, it employs a set of restrictions that are not directly related to what should be the dispositive issue, *i.e.,* whether the person has in fact suffered an emotional injury caused by the negligence of another. As a consequence, the bystander proximity rule denies recovery to persons sustaining genuine emotional injury. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell,* 36 U.Fla.L.Rev. 413 (1984).

The full recovery rule permits a general negligence cause of action for the infliction of serious emotional distress. It requires that the mental injury be evaluated according to an objective standard. The plaintiff's claimed emotional injury must result from a situation in which a reasonable person, normally constituted,[7] would not be

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[7] "Normally constituted" has been a standard determinant in pure emotional distress cases since *Rodrigues v. State of Hawaii,* 52 Haw. 156, 472 P.2d 509 (1970). We pause to note that the reasonble person by whose constitution recovery will be gauged in maritime cases is a far heartier breed than the flooded-out homeowners in *Rodrigues. Cf. Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 339, 75 S.Ct. 382, 385, 99 L.Ed. 354, 358 (1955) ("Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter,

able to cope adequately with the mental distress occasioned by the circumstances. *See Prosser and Keeton on Torts* 365 n. 60; *see also Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 765 (1983).

These four standards reflect competing evaluations of three principal policy considerations limiting recovery for an emotional injury: (1) mental injury is often temporary and relatively trivial; (2) there is a danger that mental claims will be falsified; and (3) there is a perceived unfairness in imposing liability where the injury is a remote consequence of the wrongful act. *Restatement (Second) of Torts* § 436 A comment b; *Prosser and Keeton on Torts* 360-61.

Mindful of the relevance of these considerations, we are not persuaded that they should prevent recovery in all situations in which a person truly has suffered a consequential emotional injury. For as one noted commentary suggests:

> It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim or to look for some guarantee of genuineness in the cir-

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Footnote 7 continued.

is not the measure of the 'disposition' of 'the ordinary men in the calling.' ") (citing *Jones v. Lykes Bros. Steamship Co.*, 204 F.2d 815, 817 (2d Cir.), *cert. denied*, 346 U.S. 857, 74 S.Ct. 72, 98 L.Ed. 370 (1953)).

Inquiry into the normal constitution of a seaman-plaintiff requires a careful and studied consideration of the nature of the work undertaken, the physical and emotional requisites for the pertinent job, the training and experience of the person involved, and the ordinary characteristics and sensibilities expected of those involved in maritime pursuits. To be excluded are those persons of such fragile or delicate psyche that their resistance to emotional stress falls below that expected of a simlarly situated seaman.

> cumstances of the case. The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. And where the concern is to avoid impossing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim.

Prosser and Keeton on Torts 361. *See also The Bell Tolls*, *supra*, at 351 ("Psychiatric/psychological examining techniques have increased markedly in sophistication since the advent of the physical impact, zone of danger and ensuing physical injury rules. As a result, successfully feigning a psychic injury is not an easy matter."). Consequently one who has suffered a significant emotional injury should not be denied recovery simply because the factual scenario does not satisfy some earlier-selected, fictitious method of authenticating the injury.

There need be little reminder of the mandated liberal interpretation to be ascribed to the FELA and Jones Act. *Buell*, 480 U.S. at 561-62, 107 S.Ct. at 1413-14; *Gaston*, 866 F.2d at 818. We conclude that a rule which allows recovery for true, significant mental injuries is best attuned to that mandate.[8] Having so stated, we remain vitally aware that seamen and railroaders have chosen callings that "involve braving certain hazards [which] are traditionally not well suited to the squeamish or faint hearted." *Gaston*, 866 F.2d at 820. In evaluating claims of emotional injury, courts must attribute to those who choose these callings the appropriate daring and strength and quality of character.

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[8] Today's ruling necessarily belies what we now perceive to be the myopic prognostication of *Gaston*, 866 F.2d at 819.

Applying the rubric we adopt today to the facts of the case at bar, we find that the district court appropriately dismissed the complaint. The injury complained of is not a reasonably foreseeable consequence of the alleged negligence. One would not reasonably expect a normally constituted seaman, much less a senior, very experienced tugboat captain, to have the emotional reaction alleged by Plaisance who, objectively assessed, was not threatened by the fire. Further, fires in the oilfield and the flaring of gas were not unusual sights and the other crews were not placed in significant danger. Indeed, the crews of the barge and accompanying tugboat quickly moved to the safety of Plaisance's vessel, which Plaisance placed directly against the barge without being so ordered and without comment. It was a smooth, nigh routine maneuver lasting only a few minutes. It was not until many hours later, and only after he allegedly slipped and fell on spilled fuel on his deck that Plaisance asked to be relieved. Our conclusion is buttressed by the observation of the treating psychiatrist who testified that he was baffled by Plaisance's overall reaction. We share that bafflement.

The judgment of the district court is AFFIRMED.

EDITH H. JONES, Circuit Judge, concurring and dissenting:

With this decision, the majority fashion a general negligence cause of action for infliction of serious emotional distress and have become the first court to accept the Supreme Court's "open invitation to the lower federal courts to explore the possibility of recovery under the FELA for a purely emotional injury."[1] Because this

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[1] Slip op. at 5284 (citing *Moody v. Maine C.R. Co.*, 823 F.2d 693 (1st Cir.1987)).

holding is not warranted on the facts before us, imprudently rejects all accepted limitations on emotional injury claims, and conflicts with our precedents, I respectfully dissent from its reasoning, though not from the judgment.

At the outset, it must be noted, the majority have essentially issued an advisory opinion. After finding that there is a cause of action for purely emotional injuries under the FELA and the Jones Act and detailing the analysis for such claims, the majority reject Plaisance's claim because the "injury complained of is not a reasonably foreseeable consequence of the alleged negligence." Because Plaisance failed to establish the *prima facie* elements of any negligence claim, no matter how broadly drawn, it would have been better not to decide whether emotional distress damages are under other circumstances compensable.

The majority have detailed the relevant decisions of this and other circuits, and I will not duplicate their efforts. It suffices to observe that all except the Ninth Circuit have treated emotional injury claims with circumspection. Two of the circuits have rejected claims for emotional injury unaccompanied by physical impact or a threat of impact; one circuit is dubious about it; and only the Ninth stands

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Footnote 1 continued.

The Ninth Circuit was the first circuit court to recognize a claim under the FELA for purely emotional injuries in *Atchison, T. & S.F.R. Co. v. Buell*, 771 F.2d 1320 (9th Cir.1985), the case underlying the Supreme Court's "open invitation" to the lower federal courts to explore such claims. Bound by its own precedent, the Ninth Circuit continues to recognize such claims. *See Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986). The majority opinion, however, is the first opinion after *Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), to recognize an emotional distress claim under the FELA and the Jones Act.

by a purely emotional injury FELA claim.[2] Our own circuit has cabined this type of claim.[3] *Gaston v. Flowers*, 866 F.2d 816 (5th Cir.1989); *see also Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315 (5th Cir.1986).

In *Gaston.* this court refused to construe the FELA to cover bystander injuries. *Id.* at 819. The court explained that because bystander recovery would vastly increase employers' exposure to damages based on random factors that are unrelated to the safe operation of a train or vessel, for example, how many crew members observe an accident, whether their vision is obscured by darkness or weather, or how close they are to the accident scene, such liability would not advance a major purpose of the FELA and the Jones Act—providing employers with incentives to reduce dangers and to operate safely. *Id.* at 820. As *Gaston* observed, allowing bystander recovery could create potentially ruinous liability for employers.

Here, the majority's analysis of emotional distress

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[2] *Gaston*, 866 F.2d at 818-19 (citing *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir.1987) (rejecting FELA claim for intentional infliction of emotional distress and hinting that it might also reject a claim for negligent infliction of emotional distress); *Hammond v. Terminal R.R. Assoc. of St. Louis*, 848 F.2d 95 (7th Cir.1988) (rejecting recovery for emotional injury without physical contact); *Moody v. Marine Central R.R. Co.*, 823 F.2d 693 (1st Cir.1987) (observing that its pre-*Buell* holding refusing recovery for purely emotional injury might now be in doubt); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309 (9th Cir.1986) (holding employer liable for plaintiff's emotional injury).

[3] Although the *Hagerty* court purported to reject the physical impact/injury requirement for recovery for emotional injuries, that holding was later deemed dicta and the necessity of physical impact or injury for recovery remains an open question. *See Gaston v. Flowers*, 866 F.2d 315 (5th Cir.1989) ("While the *Hagerty* court did observe that a Jones Act recovery was possible without physical impact, that statement was necessarily dictum; for Mr. Hagerty *did* suffer impact, having been drenched with cancer-causing chemicals.").

claims would allow bystanders to recover for emotional injuries if a "reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances" that he witnessed. Applying the majority's analysis to the facts of *Gaston* would lead to a different result. Gaston witnessed his half-brother's death. He tried but failed to pull his half-brother to safety as he was crushed between two ships. After this traumatic event, it is quite likely that a reasonable person would not be able to cope adequately with the ensuing mental distress. Yet *Gaston* denied the plaintiff's emotional distress claim.

The majority wave away the inconsistency between today's ruling and *Gaston* by calling the earlier precedent a "myopic prognostication." A more convincing explanation is demanded to escape the force of binding circuit precedent, yet the majority make no attempt to distinguish or limit *Gaston*. By rejecting bystander recovery, *Gaston* implicitly held that this court must analyze emotional distress claims under a standard at least as restrictive as the zone-of-danger test, which requires that the plaintiff be personally endangered.

Finally, even if this issue were properly before us and the majority's holding did not untenably overrule *Gaston*, I would differ with their analysis because it departs from the great weight of authority partly designed to prevent feigned claims of emotional injury. *See Restatement (Second) of Torts* § 436 A (1965) (negligent acts that result in purely emotional injuries are not a source of liability); W. Prosser & W. Keeton, *The Law of Torts*, § 54 (5th ed. 1984).

The majority's opinion sets forth the common-law approaches to emotional distress claims—physical impact or injury, zone-of-danger, and bystander recovery—but

then rejects these "earlier-selected, fictitious method[s] of authenticating [emotional] injury," as arbitrary tests that prevent recovery in cases of genuine and serious injury. In place of the accepted common-law rules, the majority adopts the "full recovery rule," which allows a "general negligence cause of action for the infliction of serious emotional distress ... evaluated according to an objective standard."[4]

The majority adopted their standard from *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970), the first case to allow a general negligence action for emotional distress.[5] Only Hawaii, California, and a minority of other states allow this cause of action. *See* W. Prosser & W. Keeton, *supra*, § 54 at 364-65. The majority of courts compensate emotional distress claims provided the mental distress can be authenticated by some physical injury, illness or other objective physical manifestation. *See id.* at

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[4] The majority holding is not expressly limited to negligent infliction of emotional distress claims, and its definition of the full recovery rule could be construed to encompass claims for the intentional infliction of emotional distress. However, the Plaisances' emotional distress claim is based solely upon a negligence theory and the issue of intentional infliction of emotional distress is not presented in this appeal. If the majority opinion is intended to cover intentional claims, I would have another reason to disent.

[5] In *Rodrigues*, the court held that the plaintiffs were entitled to damages for the emotional distress they suffered after the State negligently failed to clear a drainage culvert and their house was flooded. In *Campbell v. Animal Quarantine Station, Etc.* 63 Haw. 557, 560, 632 P.2d 1066, 1068 (1981), the court applied *Rodrigues* to the plaintiffs' claim for the emotional distress they suffered when their dog died because of the defendants' negligence. The court held that the plaintiffs could recover for their emotional distress even if they did not witness the tortious event, or introduce medical testimony to substantiate their claims of serious emotional distress. *Id.* at 562, 632 P.2d at 1069.

364 & cases cited in n. 55.[6] "[C]ases will obviously be infrequent in which 'mental disturbance,' not so severe as to cause physical harm, will clearly be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case." *Id.* at 362; *see also Restatement (Second) of Torts* § 436(1) and (2) (1965) (negligent conduct that causes bodily harm solely through emotional disturbances, without physical contact, may be a basis for liability).

One may sympathize with the generous spirit that prompts the majority to recognize the potential genuineness and severity of some emotional injury claims. To acknowledge their existence is not, however, to establish a principled framework for recovery. The majority's "rule" involving the "reasonable able-bodied seaman" is not so much that as an open invitation to creative pleading. Most of the circuits, apparently realizing the slipperiness of such claims, and their proneness to triviality or falsity, have so far wisely declined to bring such claims within the scope of FELA and the Jones Act. *Gaston*, cavalierly treated by the majority, placed limits on such claims. To top it off, Plaisance, having fathered an incredibly broad expansion of liability, will get no benefit from it himself—an ironic twist to a compensation-oriented opinion. This is no way to run a railroad.

---

[6] A growing number of court no longer require physical manifestations of emotional distress for recovery. *See Corgan v. Muehling*, 1991 W.L. 90376, 143 Ill.2d 296, ___ Ill.Dec. ___, ___ N.E 2d ___ (Ill.1991); *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990); *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex.1987); *Gates v. Richardson*, 719 P.2d 193 (Wyo.1986). *But see Hancock v. Northcutt*, 808 P.2d 251 (Ala.1991); *Reilly v. United States*, 547 A.2d 894 (R.I.1988); *Cunningham v. Lockard*, 48 Wash.App. 38, 736 P.2d 305 (1987).

APPENDIX D

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

Feb. 11, 1992.

Appeal from the United States District Court for the Eastern District of Louisiana, A.J. McNamara, Judge.

(Opinion August 9, 1991, 5 Cir., 1991, 937 F.2d 1004)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, E. GARZA and DeMOSS, Circuit Judges.*

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

---

*Judge Duhe is recused, and therefore did not participate in this decision.

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX E

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

July 14, 1992.

Tugboat captain and spouse brought action against employer and tug charterer to recover under Jones Act and general maritime law for emotional injury that resulted from witnessing fire. The United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., 735 F.Supp. 686, dismissed claims. Captain and spouse appealed. The Court of Appeals, 937 F.2d 1004, affirmed. Rehearing en banc was granted, 954 F.2d 266. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that captain's posttraumatic stress disorder was not a reasonably foreseeable consequence of negligence, and therefore, was not compensable.

Affirmed.

Politz, Chief Judge, specially concurred and filed opinion joined by Jerre S. Williams, Circuit Judge.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before POLITZ, Chief Judge, WILLIAMS, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Henry A. Plaisance, Jr. and his wife appealed the dismissal of their action under the Jones Act and general maritime law to recover for emotional injuries unaccompanied by any physical injury. A panel of this court held that the Jones Act allows recovery for purely emotional injuries but affirmed the dismissal of the Plaisances' claim. Upon rehearing en banc, we affirm dismissal of the suit but hold that the facts of this case make it unnecessary for us to decide whether the Jones Act permits recovery for purely emotional injuries.

I.

In January 1989, Mr. Plaisance, a tugboat captain with over thirty years of experience, was operating the tug TOMMY CROSBY for his employer, Crosby Marine Service, Inc. (Crosby). The tug was chartered to Texaco, Inc. At the time, the TOMMY CROSBY was towing a workover barge from one well site to another in Louisiana coastal waters. A second tug, the VERGIE CENAC was tied to the stern of the barge. While this flotilla was en route to a new well, one of the barge's spuds, projecting below the waterline, struck an underwater gas pipeline. The pipeline ruptured, causing gas to escape and an explosion and fire to ensue.

Following the explosion, fire broke out on the rear of the barge and the front of the VERGIE CENAC. Mr. Plaisance backed the TOMMY CROSBY to the bow of the barge, and the crews from the barge and the VERGIE CENAC boarded the TOMMY CROSBY to escape the fire. The tow was then disconnected, and Mr. Plaisance moved the TOMMY CROSBY a short distance away from the barge. The tether lines between the barge and the VERGIE CENAC burned, and the VERGIE CENAC drifted away from the ruptured site. Upon instructions from a Texaco supervisor, Mr. Plaisance reconnected the tow lines to the barge, pulled it away from the ruptured site, and spudded it in place.

The crews from the flotilla and other vessels that had responded to the fire extinguished the fire in less than thirty minutes. Mr. Plaisance did not personally participate in fighting the fire. The explosion did not damage the TOMMY CROSBY, and the fire did not spread to it from the barge or the other tug. Mr. Plaisance was never in danger and, fortunately, no one was injured by the fire.

After the fire was extinguished, the flotilla reformed and proceeded to a nearby Texaco camp. The TOMMY CROSBY then continued on to a Texaco fuel dock in the vicinity to receive a load of diesel fuel for the barge. Once the tug transferred the fuel to the barge, the TOMMY CROSBY towed the barge to a repair dock in Cocodrie, Louisiana. Upon his arrival at the repair dock, Mr. Plaisance told a Texaco representative that he did not feel well and asked to be relieved of duty.

Later that day, Mr. Plaisance went to a local hospital where he was treated for several days. He then transferred to a psychiatric hospital where he received treatment for an extended period of time. According to the treating

psychiatrist, Mr. Plaisance was suffering from post-traumatic stress disorder because of his belief that he or someone else could have been killed in the explosion and fire. Mr. Plaisance has continued to receive periodic psychiatric care since his release from the hospital. He contends that he has not been able to return to work.

Mr. Plaisance and his wife later filed this personal injury suit against Crosby under the Jones Act, 46 U.S.C.App. § 688, and general maritime law and against the vessel charterer, Texaco, under the general maritime law. Crosby and Texaco moved for dismissal or summary judgment on all claims on grounds that purely emotional injuries are not cognizable under the Jones Act or general maritime law. The district court granted the motion and dismissed the Plaisances' suit. See *Plaisance v. Texaco, Inc.*, 735 F.Supp. 686 (E.D.La.1990).

On appeal, a panel majority of this court affirmed the district court's dismissal. See *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991). Despite its conclusion, the panel majority adopted the so-called full recovery rule for this circuit for the recovery of emotional injuries. Under this rule, recovery is permitted in a negligence action for infliction of serious emotional distress where "a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances." *Id.* at 1010.

The panel majority concluded, however, that the Plaisances were not entitled to recover because Mr. Plaisance's injury "was not a reasonably foreseeable consequence of the alleged negligence." *Id.* The panel majority reasoned that one would not expect a seaman with Mr. Plaisance's experience to suffer such an emotional reaction when he was not objectively threatened by the fire. We

took this case en banc to consider whether its facts were appropriate ones for us to establish a rule for the recovery of purely emotional injuries under the Jones Act.

II.

A.

The panel majority fairly describes the various models that have been adopted or proposed by the states for recovery of emotional injuries. These four theories, in decreasing order of difficulty for a plaintiff to establish, are:

> (1) physical injury or impact rule: permitting "recovery for emotional injury provided there is some physical contact;"
>
> (2) zone of danger rule: providing recovery for emotional injuries absent any physical contact, which result "from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence;"
>
> (3) bystander proximity rule: permitting "recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim;" and
>
> (4) full recovery rule: allowing recovery in a negligence action for infliction of serious emotional distress where "a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances."

Plaisance, 937 F.2d at 1009-10.

We agree with the panel that Mr. Plaisance's injury was not a reasonably foreseeable consequence of the defendants' negligence. Thus, under any known theory of recovery—even the most liberal—the Plaisances have failed to establish their claim. Stated differently, the Plaisances have not presented a prima facie case to recover any damages arising from this incident. Consequently, we conclude that the facts of today's case do not permit us to decide whether or under what circumstances we might permit recovery of damages for purely emotional injuries. Other circuit courts have similarly resisted adopting a general rule of recovery for purely emotional injuries in cases where the plaintiff has failed to present a prima facie case. *See, e.g., Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425 (6th Cir.1988).

B.

To avoid any possible confusion that our decision to review this case en banc may cause, we emphasize that *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), continues to represent the law of this circuit. In *Gaston*, a seaman brought suit under the Jones Act for purely emotional injuries he allegedly suffered when he saw his half-brother crushed to death between two vessels. A panel of this court affirmed the district court's dismissal of Gaston's action. The court reasoned that construing the Jones Act to cover a *bystander's* injuries would represent a major departure from the existing jurisprudence. The court recognized that such a move would require it to allow recovery for injuries resulting not from physical trauma, or the fear of physical trauma, to the plaintiff but from witnessing a "bad sight," i.e., harm to another. *Id.* at

819-20.

The holding in *Gaston* is limited but instructive. The court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury. The court also determined that a bystander could not recover for merely witnessing harm to another where the plaintiff suffered no harm or threat of harm. In rejecting bystander recovery, *Gaston* implicitly foreclosed recovery under any less exacting model, such as a full recovery theory. *Gaston* leaves open the question whether a plaintiff may recover for purely emotional injuries under a zone of danger theory.

III.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

POLITZ, Chief Judge, with whom JERRE S. WILLIAMS, Circuit Judge, joins, specially concurring:

I join in the judgment of the court. I do not agree with the majority, however, that in the resolution of this case it is "unnecessary for us to decide whether the Jones Act permits recovery for purely emotional injuries," without physical injury or contact. I believe such to be an imperative for that is the entirety of the Plaisance claim. He seeks recovery solely for emotional injuries arising out of an occurrence which happened to him. He claims no physical injury. I would reach and decide whether purely emotional injuries are recoverable under the Jones Act. In doing so I would again conclude, as did the majority of the

panel, *Plaisance v. Texaco*, 937 F.2d 1004 (5th Cir.1991), that such an injury may serve as the basis for recovery under the FELA and Jones Act.

(2)

No. 92-625

FILED
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In The

Supreme Court of the United States

October Term, 1992

MR. AND MRS. HENRY A. PLAISANCE, JR.,
Petitioners,

vs.

TEXACO, INC. and CROSBY MARINE SERVICE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The issue presented by petitioners is moot. Since the Fifth Circuit, *en banc*, repudiated and vacated the "full recovery rule," whether that rule envisioned questions of law or fact is entirely hypothetical and thus irrelevant. Consequently, the petition for certiorari should be denied.

2. The demands of Jones Act uniformity preclude a seaman from maintaining a cause of action for purely emotional injury pursuant to the general maritime law of unseaworthiness and negligence since such an action cannot be maintained under the Jones Act. Because the Fifth Circuit has rejected purely emotional injury claims under the Jones Act, and petitioners have not fairly raised that issue for review, the petition for certiorari should be denied.

LIST OF PARTIES

The following are the parties who have an interest in this proceeding:

1. Henry Anthony Plaisance, Jr.
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APPENDIX

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OPINIONS BELOW

The initial decision with written reasons by the United States District Court for the Eastern District of Louisiana is reported at 735 F. Supp. 686 and appears in Petitioner's Appendix A. The ruling on motion for new trial, by "Minute Entry" dated March 7, 1990, is unreported and appears at Petitioner's Appendix B.

The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 937 F.2d 1004 and appears at Petitioner's Appendix C. Rehearing *en banc* was ordered at 954 F.2d 266 and appears at Petitioner's Appendix D. By granting rehearing *en banc*, the Fifth Circuit vacated the earlier panel decision pursuant to Fifth Circuit Local Rule 41.3, which appears at Respondents' Appendix A, (1a). The opinion of the U.S. Court of Appeals for the Fifth Circuit *en banc* is reported at 966 F.2d 166 and appears at Petitioner's Appendix E.

STATEMENT OF JURISDICTION

Respondents object to the jurisdiction of this Court to decide whether application of the "new rubric" or "full recovery rule" is a determination of law or fact. As noted in the body of Respondents' Brief in Opposition to Petition for Writ of Certiorari, that question has been rendered moot by the *en banc* ruling of the United States Court of Appeals for the Fifth Circuit in *Plaisance v. Texaco, Inc.*, 966 F.2d 166, which abandons that rule. As the "new rubric" no longer exists, there is no actual case or controversy before this Court. Accordingly, jurisdiction is improper. U.S. Const., Art. III, § 2, Cl. 1; *Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978); *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Merchant Marine Act (The Jones Act), 46 U.S.C § 688(a) (West 1992):

> (a) Application of Railway Employee Statutes; Jurisdiction
>
> Any seaman who shall suffer pesonal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

2. U.S. Const., Art. III, § 2, Cl. 1.

> Jurisdiction of Courts: Section 2.
>
> The judicial Power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . .

STATEMENT OF THE CASE

Henry Plaisance and his wife filed suit in the United States District Court for the Eastern District of Louisiana, on June 14, 1989, claiming that an accident occurring on January 29, 1989, caused petitioners to suffer "injuries to their minds and bodies." Texaco Inc. and Crosby Marine Service, Inc. (hereinafter "Texaco"

and "Crosby") were named as defendants. Petitioners claimed damages for "loss of consortium, pain and suffering, disability and loss of wages, past, present, and future." Texaco and Crosby answered the suit denying liability. After a period of time to conduct discovery, Texaco and Crosby moved for summary judgment or to dismiss pursuant to F.R.C.P. Rule 12(b)(6) all claims based on purely emotional injury. Excluded from Texaco's and Crosby's motion was Plaisance's claim for maintenance and cure and personal injury resulting from an alleged fall occurring subsequent to the events leading to the emotional injury claim.

The only issue the district court found properly before it was the petitioners' claims based on purely emotional injury. The district court held that neither the general maritime law (including the doctrine of unseaworthiness) nor the Jones Act recognized a cause of action for purely emotional injury, granted the motion of Texaco and Crosby and dismissed petitioners' complaint. On January 30, 1990, judgment was entered in favor of respondents, Texaco and Crosby.

Subsequently, Mr. and Mrs. Plaisance moved the district court to reconsider or for a new trial. Texaco and Crosby opposed this motion and the district judge denied the motion by order entered March 8, 1990.

Thereafter, on May 14, 1990, petitioners' filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. After oral argument, the Fifth Circuit panel issued its opinion, affirming the district court's order and judgment of dismissal on August 9, 1991 *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991). Despite affirming the lower court, the Fifth Circuit panel purported to create a new cause of action under the Jones Act for purely emotional injuries. This cause of action was to be measured by a "new rubric" called the "full-recovery rule." Petitioners then filed a petition for panel rehearing on August 21, 1991. That petition was rendered moot by the Fifth Circuit's *sua sponte* order

directing rehearing *en banc*, dated February 11, 1992. *Plaisance v. Texaco, Inc.*, 954 F.2d 266 (5th Cir. 1991). By granting rehearing *en banc*, the Fifth Circuit vacated the earlier panel decision. *See* Fifth Circuit Local Rule 41.3 and letter to counsel of record from Gilbert F. Ganucheau, Clerk of the United States Court of Appeals for the Fifth Circuit at 2a. After rehearing *en banc*, the Fifth Circuit affirmed the district court's dismissal of Plaisance's emotional injury claims but repudiated the remainder of the panel's prior holding. *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992). By that decision, the Fifth Circuit, *en banc*, realigned itself with all, save one, of the federal circuits, uniformly denying recovery for purely emotional injury under the Jones Act and general maritime law.[1]

On October 9, 1992, petitioners filed a petition seeking a writ of certiorari to the Fifth Circuit. Petitioners do not seek review from the Fifth Circuit's ruling recanting the "new rubric" or "full-recovery" rule created by the prior panel decision.[2] Rather, they curiously request this Court to determine whether that now defunct rule is a question of law or fact and whether it allows a cause of action for purely emotional injury under the general maritime law.

A. Statement of Facts

Henry Plaisance was a tug captain of long experience, having

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1. The Ninth Circuit stands alone among the federal courts in finding a "wholly mental injury" compensable under the FELA [made applicable to the Jones Act, 46 U.S.C. § 688] "regardless of its characterization as mental or physical." *Aitcheson, Topeca & Santa Fe Railway Co. v. Buell*, 771 F.2d 1320, 1324 (9th Cir. 1985), *affirmed in part, vacated in part*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987). In *Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309 (9th Cir. 1986), then Judge Kennedy, now Justice Kennedy, expressed serious reservations about the Ninth Circuit's *Buell* decision but felt compelled to follow it as precedent in the Ninth Circuit.

2. *See* Rule 14.1(a) of the Rules of the Supreme Court.

worked more than ten years with Crosby Marine Service, Inc. or its predecessor companies. Indeed, Plaisance had worked in the maritime oil field for over 30 years. He had seen gas flared on a number of occasions. Yet on the day of his "accident" he saw an oil field fire which caused no damage to his vessel and injured no one, but allegedly caused Plaisance to be totally, emotionally disabled.

On January 29, 1989, Plaisance was the captain in charge of the tug TOMMY CROSBY. This vessel is owned by Crosby Marine and was under charter to Texaco. The vessel was operating in Texaco's Caillou Island Field, a producing oil field located in the coastal waters of Terrebonne Parish, Louisiana. On this day, the TOMMY CROSBY was towing a barge loaded with equipment used to work over and plug abandoned oil wells. Plaisance and others had been working with this barge for several months. A crew working on the barge would perform plug and abandonment operations on depleted Texaco wells. Plaisance, as operator of the TOMMY CROSBY, would tow the barge from well to well as the work progressed. Texaco also had under charter a tug named VERGIE CENAC to assist in this operation.

At approximately 7:00 a.m. on January 29, 1989, the TOMMY CROSBY was towing the barge to a new well location in the Caillou Island Field. The tug VERGIE CENAC was tied to the stern port quarter of the barge. While in route to the new location, the TOMMY CROSBY or her tow, with Captain Plaisance at the helm, struck a pipeline causing gas or other hydrocarbons to erupt and subsequently ignite and burn.

This fire caused some damage to the barge, specifically the structure located on the barge which provided the plug and abandonment crew with living quarters. The fire also damaged the VERGIE CENAC. However, the fire did not cause any damage to the tug TOMMY CROSBY.

Since Plaisance's vessel was at all times safely removed from

the fire, it became the safe haven to which all fled. In order to escape the fire, the barge crew abandoned the barge and boarded the TOMMY CROSBY which had backed up to the barge. The crew from VERGIE CENAC also boarded the TOMMY CROSBY via the barge. Captain Plaisance then steered the barge away from the area of the fire.

Several vessels working in the Caillou Island Field responded to the fire and the crews of these vessels extinguished the fire on the barge and the tug VERGIE CENAC in less than half an hour. Plaisance remained on the TOMMY CROSBY during the entire episode and did not assist in fighting the fire.

On the TOMMY CROSBY, Plaisance was at all times a good distance from the fire. Plaisance testified that he operated the controls of the TOMMY CROSBY from the rear of the vessel. He stated that the TOMMY CROSBY was about sixty feet long, that the tow line was approximately ten feet long, and the barge was about 130 feet long.

Neither Plaisance nor anyone else received any injuries whatsoever as a result of this fire.

After the fire was extinguished, the VERGIE CENAC, the barge, and the TOMMY CROSBY, with the assistance of another tug, proceeded to Texaco's operting facility in the Caillou Island area. Several hours later, Plaisance piloted the TOMMY CROSBY from Caillou Island to Cocodrie, Louisiana. This trip took approximately three and one half to four hours. Upon arrival in Cocodrie, Plaisance, for the first time, complained to Texaco's representative, Henry Prejean, that he could not continue as captain of the TOMMY CROSBY and asked to be relieved.

Later that same day, Plaisance was admitted to Our Lady of the Sea Hospital in Galliano, Louisiana, where he was treated for a few days and was then admitted to Bayou Oaks Psychiatric Hospital in

Houma, Louisiana, where he was treated as an in-patient for approximately forty-five days. He was released, and then readmitted and treated again for several weeks as an in-patient. Plaisance has continued to receive psychiatric care from time to time since the accident.

In deposition testimony, Captain Plaisance expressed a disinclination and inability to return to work as a tug captain. Plaisance was diagnosed as suffering from post-traumatic stress disorder and depression by Dr. D. F. Carlos. Dr. Carlos testified he was baffled by Plaisance's inability to recover from this condition, and that initially he had expected Plaisance to return to work in aproximately three weeks following his admission to the psychiatric hospital.

At the time of his deposition, Henry Plaisance complained of nervousness, anxiety, nightmares, headaches and neck pain. Plaisance seemed to attribute the headaches and neck pain to his alleged slip and fall accident, which the district court found was unrelated to the purely emotional injury claim. According to Dr. Carlos, Plaisance's complaints did not have a physical or physiological cause. Rather, the alleged complaints appear to be wholly psychological.

Plaisance claims total disability based on a purely emotional condition, characterized as post-traumatic stress disorder, unaccompanied by any physical trauma.

SUMMARY OF ARGUMENT

The petitioners in this matter have not shown any reason, within the considerations governing review of a writ of certiorari, why the Court should grant this petition. The petitioners' contention begins with the proposition that a seaman may recover for wholly emotional injuries under a "new rubric" or "full-recovery rule" created by a panel of the Fifth Circuit in *Plaisance v.*

Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991) (*Plaisance I*). They ask this Court to determine whether application of the "new rubric" is a determination of law or fact. Unfortunately, petitioner's ignore the fact that the "new rubric" or "full-recovery rule" was vacated and repudiated by the subsequent *en banc* decision in *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (*Plaisance II*). In vacating the panel decision in *Plaisance I*, the Fifth Circuit *en banc* returned to the rule enunciated in *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), which precludes claims for purely emotional injuries of the type alleged and described by Plaisance. *Plaisance II*, 966 F.2d at 169; *see also, Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546 (5th Cir. 1992). By thus holding, the *en banc* court corrected the anomaly created by the original *Plaisance* panel and returned to the standard adopted by both common law and federal jurisprudence. *Carroll v. Consolidated Rail Corporation*, __ U.S. __, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992); *Ray v. Consolidated Rail Corporation*, __ U.S. __, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992) (Justices White and Thomas dissenting from denial of writs). Since no "new rubric" or "full-recovery rule" survived the order granting rehearing *en banc*, nor the *en banc* decision in *Plaisance II*, petitioners' request that this Court decide whether the rule is a question of law or fact is necessarily moot. Indeed to render such a decision now would be wholly hypothetical and thus advisory.

Further, there is no basis for petitioners' proposition that the general maritime law will entertain recovery for purely emotional injury when the Jones Act will not. *Plaisance II*, 966 F.2d at 196 (reaffirming *Gaston* as the rule of the Fifth Circuit for emotional injury recovery). This Court has consistently sought to maintain a uniform system of recovery under the Jones Act and the general maritime law. *Miles v. Apex Marine Corp.* 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). Even though the general maritime law is a "living, breathing body of law" as alleged by petitioners, this Court has made clear that the law must live and breathe within

congressionally mandated restrictions enuciated in the Jones Act. As noted by this Court, "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed in cases of death [or injury] resulting from negligence." *Miles*, 111 S. Ct. at 326. Allowing recovery for purely emotional injury under the general maritime law, while not recoverable under the Jones Act, would create an inconsistency in the law which would undermine the uniformity this Court has consistently strived to maintain in the area of seamen's recovery. Further, petitioner cannot point to a single case where wholly emotional injuries have been compensated under the general maritime law. The rule in the Fifth Circuit is that such damages are not recoverable under that regime. Petitioners thus fail to allege any grounds, within the meaning of Rule 10 of the Rules of the Supreme Court, to justify the granting of a writ on this issue.

In all, there is no basis for the proposition tht the Jones Act will allow recovery for a purely emotional injury under the "new rubric" cited by petitioner. That rule no longer exists in the United States Court of Appeals for the Fifth Circuit. Further, no other federal circuit has recognized that rule. Since the Jones Act does not recognize recovery for purely emotional injury, uniformity demands that none be created under the general maritime law. The instant petition raises neither a conflict among the circuits nor "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. Accordingly none of the criteria under Rule 10 of the Rules of the Supreme Court apply to the present petition.

REASONS FOR DENYING THE WRIT

Petitioners' action in raising the instant writ are indeed curious. The panel decision in *Plaisance I*, 937 F.2d 1004 (5th Cir. 1991), was vacated and repudiated by the subsequent *en banc*

decision in *Plaisance II*, 966 F.2d 166 (5th Cir. 1992). As such, no "new rubric" or "full-recovery rule" survives. Rather than seek review of that decision, petitioners ask this Court to issue an advisory opinion on whether the "new rubric," which no longer exists, forms a question of law or fact. Such a request is flawed on its face and must be denied. Second, petitioners have asked this Court to allow recovery for wholly emotional injury under the general maritime law. Since such recovery has been precluded under the Jones Act, uniformity demands its preclusion under the general maritime law. For these reasons, the Court should deny the instant petition for writ of certiorari.

I.

PETITIONERS RELY ON A RULE WHICH HAS BEEN SUBSEQUENTLY VACATED AND REPUDIATED BY THE FIFTH CIRCUIT *EN BANC*.

Petitioners make much of the "new rubric" or "rule" established by a panel of the Fifth Circuit in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991) (*Plaisance I*). Termed the "full-recovery rule," this new cause of action provided for recovery for the negligent infliction of emotional distress where "a reasonable person normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances." *Id.* at 1010.

The "full-recovery rule," finding its origin in a legal tome and abandoned jurisprudence, was not consistent with prior Fith Circuit precedent and went far beyond the law of other federal circuits.[3] *See Carroll v. Consolidated Rail Corporation*, ___ U.S.

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3. The panel in *Plaisance I* relied on a law review article, Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychiatric Injury*, 36 U. Fla. L. Rev. 333 (Cont'd)

__,112 S. Ct. 916, 116 L. Ed. 2d 816 (1992); *Ray v. Consolidated Rail Corporation*, ___ U.S. ___, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992) (Justice White, dissenting from denial of writ, highlights the decision in *Plaisance I* as creating a rift in the federal circuits regarding recovery for purely emotional injuries). Further, the "new rubric" developed by the Fifth Circuit panel was alien to common law developments from which a court must "glean guidance."[4] *Aitcheson, Topeka and Santa Fa Railway Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 1417, 94 L. Ed. 2d 563 (1987); *see Restatement (Second) of Torts* § 436 A (1965); *Diaz v. Eastern Airlines, Inc.*, 698 F. Supp. 18, 21 (D.P.R. 1988); *Saecho v. Matsakoun*, 717 P.2d 165, 169 (Or. Ct. App. 1986); *Savard v. Cody*

(Cont'd)

(1984) and a Hawaii Supreme Court case. *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970). Professor Bell has been severly criticized. *See* Pearson, *Liability for Negligently Inflicted Psychic Harm: Response to Professor Bell*, 36 U. Fla. L. Rev. 413, 419-420 (1984) (wherein Professor Pearson addresses the danger of "soften psychic hides" as a result of Bell's full recovery rule). Further, the Supreme Court of Hawaii has subsequently restricted the scope of *Rodriguez* in *Chedester v. Stecker*, 643 F.2d 532 (Haw. 1982). *See also, In Re Hawaii Asbestos Cases*, 734 F. Supp. 1563 (D. Hawaii 1990).

4. Plaintiff is incorrect concerning the application of Louisiana state law to this action. In FELA and Jones Act cases, the federal courts are fashioning federal common law. Thus, federal courts do a disservice to federal uniformity by adopting the law of the state in which they sit. Rather, they sould take a broad approach, "glean[ing] guidance from common law developments." *Buell*, 107 S. Ct. at 1417; *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). Even if Louisiana state law were to apply, recovery in this context would be denied. Under Article 2315.6 of the Louisiana Civil Code, a person who witnesses an event causing harm to another may recover for his mental anguish or emotional distress *only* if the victim is a relative. La. C.C. art. 2315.6(A) (legisltaively limiting *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990) and *Clomon v. Monroe City School Board*, 572 So. 2d 751 (La. 1990)). Since petitioner has not alleged that he was related to anyone involved, much less injured, in the fire, he cannot recover under Louisiana law even if it were applicable.

Chevrolet, Inc., 234 A.2d 656, 660 (Vt. 1967); *Muchow v. Lindbald*, 435 N.W. 2d 918 (N.D. 1989); *District of Columbia v. Smith*, 436 A.2d 1294, 1296 (D.C. 1981).

Recognizing the panel's revolution in an area of law more fit for evolution, the Fifth Circuit, *sua sponte*, ordered rehearing of the panel's decision *en banc*.[5] *Plaisance v. Texaco, Inc.*, 954 F.2d 266 (5th Cir. 1991). On rehearing, 966 F.2d 166 (*Plaisance II*), the *en banc* court affirmed dismissal of plaintiff's claim for emotional injuries but repudiated the prior panel's *dicta*. *See Plaisance I*, 937 F.2d at 1013 (Jones, J., concurring in part and dissenting in part). The "new rubric" or "full-recovery rule" fell to prior circuit precedent enunciated in *Gatson v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989). *See Plaisance II*, 966 F.2d at 169. The rule of *Gaston*, forming the present law of the Fifth Circuit, does not sanction claims for purely emotional injuries of the type alleged and described by Plaisance. *Plaisance II*, 966 F.2d at 169; *see also, Ainsworth v. Penrod Drilling Corp.*, 972 F.2d 546, 547 (5th Cir. 1992) (physical impact rule enumerated in *Gaston* is rule of Fith Circuit after *Plaisance II*).

As noted by the Fifth Circuit, extension of the Jones Act or general maritime law, to cover purely emotional injury "would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages." *Gaston*, 866 F.2d at 819. Further, the circuit found "something incongruous" in allowing this type of recovery for seaman since:

> [T]hese [persons] have knowingly and voluntarily chosen a calling which, while today perhaps not fairly termed dangerous, yet does involve braving certain an hazards and are

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5. Under Fifth Circuit Local Rule 41.3, the effect of the court's granting rehearing *en banc* was to vacate to prior panel decision. *See* 1a, *infra*.

> traditionally not well suited to the squeamish or faint hearted. To undertake to enlarge such persons in damages in proportion to the delicacy of their emotional reaction seems a curious policy. For these reasons, therefore, we conclude that such a giant step as [claimant] proposes that we take is while perhaps an appropriate one for consideration by the legislature, not a proper one for a court to take.

866 F.2d at 810.

Since no "new rubric" or "full-recovery rule" survived *Plaisance II*, Plaisance's petition, requesting this Court to decide whether the rule is a question of law or fact, is necessarily moot. Indeed to render such a decision now would be wholly hypothetical and thus advisory. This Court has demanded that a case consist of a "real and substantial controversy admitting of specific relief as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937). Simply put, a federal court is not empowered to render advisory opinions or decide questions that do not effect the rights of litigants in the case before them. *Preiser v. Newkirk*, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975); *Korioth v. Briscoe*, 523 F.2d 1271, 1274-75 (5th Cir. 1975); *see also, Dixie Electric Coop v. Citizens of State of Alabama*, 789 F.2d 852, 857 (11th Cir. 1986); *Jones v. Blinziner*, 536 F. Supp. 1181, 1191 (N.D. Ind. 1982). As such, this Court should refuse petitioner's invitation to decide whether a rule, which no longer exists, forms a question of law or fact.

II.

PETITIONERS DO NOT HAVE A CAUSE OF ACTION UNDER THE GENERAL MARITIME LAW FOR PURELY EMOTIONAL INJURY.

The second question addressed to this Court by petitioners concerns whether a seaman has a cause of action for purely emotional injuries under the general maritime law of negligence and unseaworthiness. As previously discussed, *Plaisance II*, returning to the rule of *Gaston*, precludes such recovery under the Jones Act. The general maritime law cannot entertain recovery for the purely emotional injury of a seaman where the Jone Act does not. As noted by this Court in *Miles v. Apex Marine*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), the Jones Act was specifically enacted to "establish a uniform system of seaman's tort law." *Id.* at 324. Uniformity demands that general maritime law recovery be limited to that available under the Jones Act:

> Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 111 S. Ct. at 327.

Thus, courts are not free to create under their admiralty powers remedies which are deemed precluded by congressional enactments, for:

> We no longer live in an era when seaman and their loved ones must look primarily to the courts as the source of substantive legal protection from injury and death. . . .

Miles, 111 S. Ct. at 323.

Since Plaisance cannot recover under the Jones Act for purely emotional injuries, he is barred from recovery under the general maritime law. To hold otherwise, would upset the uniformity this Court has consistently strived to maintain in the realm of Jones Act recovery. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317; *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); *Schlichter v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); *Lindgren v. United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed 686 (1930).

Aside from questions of uniformity, clear Fifth Circuit precedent has established that there is no recovery for purely emotional injuries under the doctrine of unseaworthiness:

> The ancient right to recover for unseaworthiness is limited to recovery for "loss of earnings, past and prospective, . . . medical expenses . . . and also an additional sum on account of [claimant's] *physical injuries* and for pain and suffering."

Gaston, 866 F.2d at 821 (emphasis added) (citations omitted). Petitioners have cited no case allowing recovery for wholly emotional injury under the general maritime law. The absence of case law supporting such recovery necessarily leads to one conclusion: the physical injury limitation is well established in admiralty and universally applied. Accordingly, petitioners fail to allege any basis which would impel this Court to exercise its discretion in favor of granting writ on this issue. *See* Rule 10.1(a) of the Rules of the Supreme Court.

CONCLUSION

Petitioners in the instant action have failed to allege any issue worthy of this Court's attention. It is clear that the "new rubric" or "full-recovery rule" no longer exists. *Plaisance II*, 966 F.2d 166 (5th Cir. 1992); *Ainsworth*, 972 F.2d at 547. Whether the "new rubric" is a question of law or fact is therefore moot. Since the "new rubric" has no application under the Jones Act, uniformity demands that it not be adopted in the general maritime law. Accordingly, petitioners have no cause of action for purely emotional injury under that regime.

Even overlooking the issue of mootness and uniformity, the petitioners have not demonstrated any special or important reasons why a writ of certiorari should be granted in the instant action. There is neither a conflict among the circuits nor "an important question of federal law which has not been, but should be, settled by" the United States Supreme Court. *See* Rule 10 of the Supreme Court Rules. Far from creating a conflict, *Plaisance II* returns the Fifth Circuit to a rule espoused by both the federal circuits and common law authority. Further, this Court has declined, on several occasions, the invitation to create a broad rule of recovery for purely emotional injury under the FELA or Jones Act. *Buell*, 107 S. Ct. at 1418; *Carroll v. Consolidated Rail Corporation*, 112 S. Ct. 916; *Ray v. Consolidated Rail Corporation*, 112 S. Ct. 914. In so holding, this Court has settled the issue of recovery for wholly emotional injury under the Jones Act, leaving it to the federal circuits to fashion a rule based on a ". . . precise application of developing legal principles to the particular facts at hand." *Buell*, 107 S. Ct. at 1418. The particular facts of this case do not warrant petitioners' recovery under any theory of liability, much less the now silenced "new rubric."

For the foregoing reasons, this Court should deny the instant petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — LOCAL RULES AND INTERNAL OPERATING PROCEDURE OF THE FIFTH CIRCUIT

LOCAL RULE 41

41.3 EFFECT OF GRANTING REHEARING *EN BANC*
Unless otherwise expressly provided, the effect of granting a rehearing *en banc* is to vacate the panel opinion and judgment of the Court and to stay the mandate.

APPENDIX B — LETTER TO COUNSEL ENCLOSING ORDER DATED FEBRUARY 11, 1992

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

February 11, 1992

TO ALL COUNSEL LISTED BELOW:

No. 90-3183 — Plaisance v. Texaco, Inc.

Dear Counsel:

Enclosed is an order this day entered by the Court directing that this case be reheard *en banc* with oral argument.

Under Fifth Circuit Local Rule 41.3 the effect of granting a rehearing *en banc* is to vacate the previous opinion and judgment of this Court and to stay the mandate.

Pursuant to this court's direction for the Clerk to specify a briefing schedule for the filing of suplemental briefs, appellants will have until March 12, 1992, for filing their supplemental brief, with appellees' suplemental brief to be filed in this office not later than April 10, 1992. The case is tentatively scheduled for hearing during the week of May 11, 1992, therefore no extensions of time will be authorized. Counsel for the parties will receive adequate notice as to the exact date and time for the presentation of the oral argument.

Appendix B

All parties are requested to furnish twenty (20) copies of their supplemental brief, and *opening briefs* and *Record Excerpts* previously filed, for the use of the *en banc* court.

Very truly yours,

[Signature]
Gilbert F. Ganucheau

GFG/jmg
Enclosure

Mr. Joseph J. Weigand, jr.
Mr. David E. Faure
Mr. J. Ralph White

cc: Hon A.J. Mcnamara